

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-91 (10) R
Real Estate
Transfer Tax
September 24, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M910701A

On July 1, 1991, a Petition for Advisory Opinion was received from Krupp Cash Plus IV Limited Partnership, 470 Atlantic Avenue, Boston, MA 02210.

The issue raised by Petitioner, Krupp Cash Plus IV Limited Partnership, is whether an exchange by Petitioner, together with another limited partnership of all of their assets for 98.00% of the shares of common stock of Berkshire Realty Company, Inc. and the subsequent liquidation of Petitioner and the other limited partnership are subject to New York State Real Estate Transfer Tax (the "transfer tax").

Petitioner and another limited partnership, Krupp Cash Plus-V Limited Partnership ("Cash Plus-V"), formed Spring Valley Partnership, a Massachusetts general partnership (the "Joint Venture"), as of December 13, 1988. Petitioner owns a 50.10% interest in the capital, profits and beneficial interest of the joint venture, and Cash Plus-V owns a 49.90% interest in the capital, profits and beneficial interest of the joint venture. The joint venture owns a shopping center known as Spring Valley Market Place together with 30 acres of land (collectively, the "Property") located in Spring Valley, New York.

Petitioner, together with another limited partnership, Krupp Cash Plus-III Limited Partnership ("Cash Plus-III"), exchanged on June 27, 1991 all of their assets for 98.00% of the shares of common stock of Berkshire Realty Company, Inc., a Delaware corporation which will qualify as a real estate investment trust for federal income tax purposes and whose shares will be listed for trading on the New York Stock Exchange (the "REIT"). As part of the exchange, Petitioner will transfer its 50.10% interest in the joint venture to the REIT. Cash Plus-V will continue to hold its 49.90% interest in the Joint Venture. Immediately after the exchange, the common stock of REIT (which is the only class of stock authorized under REIT's Articles of Incorporation) will be owned as follows: (a) 49.32% by Petitioner; (b) 48.68% by Cash Plus-III; and (c) 2.00% by Krupp Realty Advisors Limited Partnership, the advisor (the "Advisor") to REIT.

Shortly after the exchange, Petitioner and Cash Plus-III will liquidate (the "liquidation") and distribute to their respective limited partners all of the stock of REIT held by Petitioner and Cash Plus-III. No distributions will be made to the general partners of Petitioner and Cash Plus-III, who have a profits interest in such entities immediately prior to the liquidation, but do not have any capital interest in such entities which would entitle them to any distributions of REIT's stock pursuant to the liquidation. The partnership agreements of Petitioner and Cash Plus-III require liquidating distributions to be made in accordance with capital interests. To guarantee that they will not receive any distributions of REIT's stock, such general partners have waived all rights, if any, that they have to distributions.

Following the exchange and the liquidation the partners of Cash Plus-V and the former limited partners of Petitioner beneficially will own approximately 74.61% of the interest in the joint venture. Cash Plus-V will own 49.90% of the joint venture. REIT will own 50.10% of the joint venture. The partners of Cash Plus-V will own 100% of Cash Plus-V and through such ownership beneficially will own 49.90% of the joint venture. The former limited partners of Petitioner will own approximately 49.32% of REIT and through such ownership beneficially will own approximately 24.71% (49.32% of 50.1%) of the joint venture. Consequently, the partners of Cash Plus-V and the former limited partners of Petitioner, who beneficially owned approximately 99.00% of the profits interest and 100.00% of the capital interest in the joint venture prior to the transactions, will own approximately 74.61% of the joint venture after the transactions.

Section 1401(e) of the Tax Law defines the term "conveyance", in pertinent part, to mean the conveyance upon liquidation. . . or transfer or acquisition of a controlling interest in any entity with an interest in real property.

Section 1401(b) of the Tax Law provides as follows:

(b) "Controlling interest" means (i) in the case of a corporation, either fifty percent or more the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.

Section 575.10 of the Transfer Tax Regulations provides, in part, as follows:

575.10 Mere change in identity. (Tax Law, 1405(b)(6)) To the extent that a conveyance effectuates a mere change of identity or form of ownership or organization and there is no change in beneficial ownership, the real estate transfer tax does not apply.

Examples of transactions where the issue of change in beneficial ownership would arise include the following:

(a) the conveyance by tenants-in-common of their interest in real property to a partnership or a corporation, the partnership or corporation interests being in the same pro rata shares as the tenants-in-common held prior to conveyance. Such conveyance is not taxable as there is no change in beneficial ownership;

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(b) the conveyance by a corporation to its shareholders who will hold the real property as tenants-in-common in the same pro rata share as they own the corporation. Such conveyance is not taxable as there is no change in beneficial ownership;

* * *

(d) the conveyance by a person to a partnership in exchange for an interest in the partnership. Such conveyance is not taxable to the extent of the grantor's interest in the partnership.

Pursuant to Sections 1401(b) and 1401(e) of the Tax Law the conveyance by Petitioner of its 50.10% interest in the joint venture to REIT is a transfer of a controlling interest in an entity with an interest in real property. Accordingly, such conveyance is subject to transfer tax. Nevertheless, a partial mere change of identity exemption to the extent of Petitioner's interest in REIT will be afforded to Petitioner pursuant to Section 575.10 of the Transfer Tax Regulations. Moreover, pursuant to Sections 575.10 of the Transfer Tax Regulations the distribution of the stock of REIT to the limited partners upon the liquidation of Petitioner and Cash Plus III will constitute a mere change of identity to the extent there was no change in the beneficial ownership of the stock held by the limited partners in REIT prior to the liquidation.

DATED: September 24, 1991

PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.